

**AMERICAN BAR ASSOCIATION**

**SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE**

**SECTION OF BUSINESS LAW**

**SECTION OF DISPUTE RESOLUTION**

**SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

- 1       RESOLVED, That the American Bar Association endorses the revised Standards for the  
2 Establishment and Operation of Ombuds Offices dated February, 2004.

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# **STANDARDS<sup>1</sup> FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES**

**REVISED FEBRUARY, 2004**

## **PREAMBLE**

Ombuds<sup>2</sup> receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations.

Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombuds offices, but with enormous variation in their duties and structures. Ombuds offices so established may be placed in several categories: A Legislative Ombuds is a part of the legislative branch of government and addresses issues raised by the general public or internally, usually concerning the actions or policies of government entities, individuals or contractors with respect to holding agencies accountable to the public. An Executive Ombuds may be located in either the public or private sector and receives complaints concerning actions and failures to act of the entity, its officials, employees and contractors; an Executive Ombuds may either work to hold the entity or one of its programs accountable or work with entity officials to improve the performance of a program. An Organizational Ombuds may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. An Advocate Ombuds may be located in either the public or private sector and like the others evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. These

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1. The ABA adopted a resolution in August, 2001, that supported "the greater use of 'ombuds' to receive, review, and resolve complaints involving public and private entities" and endorsed Standards for the Establishment and Operation of Ombuds Offices. These standards modify those Standards in four regards. First, they clarify the issue of notice in Paragraph F; secondly, they modify the limitations on the ombud's authority; third, they provide for a new category of executive ombuds that is described in Paragraph H; and, fourth, they modify the definition of legislative ombuds and the standards applicable to them to make them conform to the new category of executive ombuds. The 2001 Standards, in turn, expanded on a 1969 ABA resolution to address independence, impartiality, and confidentiality as essential characteristics of ombuds who serve internal constituents, ombuds in the private sector, and ombuds who also serve as advocates for designated populations.

2. The term ombuds in this report is intended to encompass all other forms of the word, such as ombudsperson, ombuds officer, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage others from using other terms.

standards were developed to provide advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

The essential characteristics of an ombuds are:

- independence
- impartiality in conducting inquiries and investigations, and
- confidentiality.

## **ESTABLISHMENT AND OPERATIONS**

A. An entity undertaking to establish an ombuds should do so pursuant to a legislative enactment or a publicly available written policy (the “charter”) which clearly sets forth the role and jurisdiction of the ombuds and which authorizes the ombuds to:

- (1) receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the ombuds’s jurisdiction as defined in the charter establishing the office
- (2) exercise discretion to accept or decline to act on a complaint or question
- (3) act on the ombuds’s own initiative to address issues within the ombuds’s prescribed jurisdiction
- (4) operate by fair and timely procedures to aid in the just resolution of a complaint or problem
- (5) gather relevant information and require the full cooperation of the program over which the ombuds has jurisdiction
- (6) resolve issues at the most appropriate level of the entity
- (7) function by such means as:
  - (a) conducting an inquiry
  - (b) investigating and reporting findings
  - (c) developing, evaluating, and discussing options available to affected individuals
  - (d) facilitating, negotiating, and mediating
  - (e) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them

- 61 (f) identifying complaint patterns and trends  
62 (g) educating  
63 (h) issuing periodic reports, and  
64 (i) advocating on behalf of affected individuals or groups when specifically authorized  
65 by the charter  
66 (8) initiate litigation to enforce or protect the authority of the office as defined by the  
67 charter, as otherwise provided by these standards, or as required by law.

## 68 QUALIFICATIONS

- 69 B. An ombuds should be a person of recognized knowledge, judgment, objectivity, and  
70 integrity. The establishing entity should provide the ombuds with relevant education and  
71 the periodic updating of the ombuds's qualifications.

## 72 INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

- 73 C. To ensure the effective operation of an ombuds, an entity should authorize the ombuds to  
74 operate consistently with the following essential characteristics. Entities that have  
75 established ombuds offices that lack appropriate safeguards to maintain these  
76 characteristics should take prompt steps to remedy any such deficiency.
- 77 (1) Independence. The ombuds is and appears to be free from interference in the  
78 legitimate performance of duties and independent from control, limitation, or a  
79 penalty imposed for retaliatory purposes by an official of the appointing entity or by a  
80 person who may be the subject of a complaint or inquiry.
- 81 In assessing whether an ombuds is independent in structure, function, and appearance, the  
82 following factors are important: whether anyone subject to the ombuds's jurisdiction or  
83 anyone directly responsible for a person under the ombuds's jurisdiction (a) can control  
84 or limit the ombuds's performance of assigned duties or (b) can, for retaliatory purposes,  
85 (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of  
86 the office.
- 87 (2) Impartiality in Conducting Inquiries and Investigations. The ombuds conducts  
88 inquiries and investigations in an impartial manner, free from initial bias and conflicts  
89 of interest. Impartiality does not preclude the ombuds from developing an interest in  
90 securing changes that are deemed necessary as a result of the process, nor from  
91 otherwise being an advocate on behalf of a designated constituency. The ombuds may  
92 become an advocate within the entity for change where the process demonstrates a  
93 need for it.
- 94 (3) Confidentiality. An ombuds does not disclose and is not required to disclose any  
95 information provided in confidence, except to address an imminent risk of serious

96 harm. Records pertaining to a complaint, inquiry, or investigation are confidential  
97 and not subject to disclosure outside the ombuds's office. An ombuds does not reveal  
98 the identity of a complainant without that person's express consent. An ombuds may,  
99 however, at the ombuds's discretion disclose non-confidential information and may  
100 disclose confidential information so long as doing so does not reveal its source. An  
101 ombuds should discuss any exceptions to the ombuds's maintaining confidentiality  
102 with the source of the information.<sup>3</sup>

## 103 LIMITATIONS ON THE OMBUDS'S AUTHORITY

104 D. An ombuds should not, nor should an entity expect or authorize an ombuds to:

- 105 (1) make, change or set aside a law, policy, or administrative decision  
106 (2) make binding decisions or determine rights  
107 (3) directly compel an entity or any person to implement the ombuds's recommendations  
108 (4) conduct an investigation that substitutes for administrative or judicial proceedings  
109 (5) accept jurisdiction over an issue that is currently pending in a legal forum unless all  
110 parties and the presiding officer in that action explicitly consent  
111 (6) address any issue arising under a collective bargaining agreement or which falls  
112 within the purview of any federal, state, or local labor or employment law, rule, or  
113 regulation, unless there is no collective bargaining representative and the employer  
114 specifically authorizes the ombuds to do so,<sup>4</sup> or  
115 (7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the  
116 office when discharging the duties of the office of ombuds.

## 117 REMOVAL FROM OFFICE

118 E. The charter that establishes the office of the ombuds should also provide for the discipline  
119 or removal of the ombuds from office for good cause by means of a fair procedure.

## 120 NOTICE

121 F. An ombuds is intended to supplement, not replace, formal procedures. Therefore:

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3. A legislative ombuds should not be required to discuss confidentiality with government officials and employees when applying this paragraph to the extent that an applicable statute makes clear that such an individual may not withhold information from the ombuds and that such a person has no reasonable expectation of confidentiality with respect to anything that person provides to the ombuds.
4. Under these Standards, the employer may authorize an ombuds to address issues of labor or employment law only if the entity has expressly provided the ombuds with the confidentiality specified in Paragraph C(3).

- 122 (1) An ombuds should provide the following information in a general and publicly  
123 available manner and inform people who contact the ombuds for help or advice that –
- 124 (a) the ombuds will not voluntarily disclose to anyone outside the ombuds office,  
125 including the entity in which the ombuds acts, any information the person  
126 provides in confidence or the person's identity unless necessary to address an  
127 imminent risk of serious harm or with the person's express consent
- 128 (b) important rights may be affected by when formal action is initiated and by  
129 whether notice is given to the entity
- 130 (c) communications to the ombuds may not constitute notice to the entity unless the  
131 ombuds communicates with representatives of the entity as described in  
132 Paragraph 2
- 133 (d) working with the ombuds may address the problem or concern effectively, but  
134 may not protect the rights of either the person contacting the office or the entity  
135 in which the ombuds operates
- 136 (e) the ombuds is not, and is not a substitute for, anyone's lawyer, representative or  
137 counselor, and
- 138 (f) the person may wish to consult a lawyer or other appropriate resource with  
139 respect to those rights.
- 140 (2) If the ombuds communicates<sup>5</sup> with representatives of the entity concerning an allega-  
141 tion of a violation, then —
- 142 (a) a communication that reveals the facts of
- 143 (i) a specific allegation and the identity of the complainant or
- 144 (ii) allegations by multiple complainants that may reflect related behavior or  
145 conduct that is either inappropriate or wrongful
- 146 should be regarded as providing notice to the entity of the alleged violation and  
147 the complainants should be advised that the ombuds communicated their  
148 allegations to the entity; but otherwise,
- 149 (b) whether or not the communication constitutes notice to the entity is a question  
150 that should be determined by the facts of the communication.
- 151 (3) If an ombuds functions in accordance with Paragraph C, "Independence, Impartiality,  
152 and Confidentiality," of these standards, then —

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5. Under these standards, any such communication is subject to Paragraph C(3).

- 153 (a) no one, including the entity in which the ombuds operates, should deem the  
154 ombuds to be an agent of any person or entity, other than the office of the  
155 ombuds, for purposes of receiving notice of alleged violations, and
- 156 (b) communications made to the ombuds should not be imputed to anyone else,  
157 including the entity in which the ombuds acts unless the ombuds communicates  
158 with representatives of the entity in which case Paragraph 2 applies.

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## LEGISLATIVE OMBUDS

- 160 G. A legislative ombuds is established by the legislature as part of the legislative branch who  
161 receives complaints from the general public or internally and addresses actions and failures  
162 to act of a government agency, official, public employee, or contractor. In addition to and  
163 in clarification of the standards contained in Paragraphs A-F, a legislative ombuds should:
- 164 (1) be appointed by the legislative body or by the executive with confirmation by the  
165 legislative body<sup>6</sup>
- 166 (2) be authorized to work to hold agencies within the jurisdiction of the office  
167 accountable to the public and to assist in legislative oversight of those agencies
- 168 (3) be authorized to conduct independent and impartial investigations into matters within  
169 the prescribed jurisdiction of the office
- 170 (4) have the power to issue subpoenas for testimony and evidence with respect to  
171 investigating allegations within the jurisdiction of the office
- 172 (5) be authorized to issue public reports, and
- 173 (6) be authorized to advocate for change both within the entity and publicly.

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## EXECUTIVE OMBUDS

- 175 H. An executive ombuds may be located in either the public or private sector and receives  
176 complaints from the general public or internally and addresses actions and failures to act of  
177 the entity, its officials, employees, and contractors. An executive ombuds may either work  
178 to hold the entity or specific programs accountable or work with officials to improve the  
179 performance of a program. In addition to and in clarification of the standards contained in  
180 Paragraphs A-F, an executive ombuds:
- 181 (1) should be authorized to conduct investigations and inquiries

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6. This restates the 1969 ABA Resolution, which remains ABA policy, that a legislative ombuds should be "appoint[ed] by the legislative body or . . . by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority, such as two thirds."

- 182 (2) should be authorized to issue reports on the results of the investigations and inquires,  
183 and
- 184 (3) if located in government, should not have general jurisdiction over more than one  
185 agency, but may have jurisdiction over a subject matter that involves multiple  
186 agencies.

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## **ORGANIZATIONAL OMBUDS**

- 188 I. An organizational ombuds facilitates fair and equitable resolutions of concerns that arise  
189 within the entity. In addition to and in clarification of the standards contained in  
190 Paragraphs A-F, an organizational ombuds should:
- 191 (1) be authorized to undertake inquiries and function by informal processes as specified  
192 by the charter
- 193 (2) be authorized to conduct independent and impartial inquiries into matters within the  
194 prescribed jurisdiction of the office
- 195 (3) be authorized to issue reports, and
- 196 (4) be authorized to advocate for change within the entity.

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## **ADVOCATE OMBUDS**

- 198 J. An advocate ombuds serves as an advocate on behalf of a population that is designated in  
199 the charter. In addition to and in clarification of the standards described in Paragraphs A-F,  
200 an advocate ombuds should:
- 201 (1) have a basic understanding of the nature and role of advocacy
- 202 (2) provide information, advice, and assistance to members of the constituency
- 203 (3) evaluate the complainant's claim objectively and advocate for change or relief when  
204 the facts support the claim
- 205 (4) be authorized to represent the interests of the designated population with respect to  
206 policies implemented or adopted by the establishing entity, government agencies, or  
207 other organizations as defined by the charter
- 208 (5) be authorized to initiate action in an administrative, judicial, or legislative forum  
209 when the facts warrant, and
- 210 (6) the notice requirements of Paragraph F do not supersede or change the advocacy  
211 responsibilities of an Advocate Ombuds.